Supreme Court, U.S.
FILED

961223 FEB 3 1997

OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term 1997

JOY TECHNOLOGIES, INC.,
COAL FIELD OPERATIONS,

Petitioner,

v.

SECRETARY OF LABOR, MINE SAFETY
AND HEALTH ADMINISTRATION

Respondent.

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit**

*W. SCOTT RAILTON
W. THOMAS MCGOUGH, JR.
PATRICK W. RITCHEY
REED SMITH SHAW & McCLAY
8251 Greensboro Drive, Suite 1100
McLean, VA 22102-3844
(703) 734-4610
Counsel of Record for Petitioner

Of Counsel:
LAWRENCE J. LEPIDI
Senior Litigation Counsel
Joy Technologies Inc.
177 Thorn Hill Road
Warrendale, PA 15086

61 pp

QUESTION PRESENTED

I.

Whether this Court should resolve an important, acknowledged conflict among four courts of appeals over the meaning of the jurisdictional term ''operator'' in the Federal Mine Safety and Health Act?

II.

Whether the decision below conflicts with decisions of this Court in refusing to interpret the undefined term ''independent contractor'' in the Act in accordance with its established meaning at common law?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Joy Technologies, Inc. and the Respondent, Secretary of Labor, Mine Safety and Health Administration.

RULE 29.1 LISTING

The Petitioner, Joy Technologies Inc. (''Joy''), is a wholly owned subsidiary of Harnischfeger Industries, Inc. (''Harnischfeger''). Harnischfeger is a Delaware corporation whose stock is listed and publicly traded on the New York Stock Exchange as HPH.

Among its subsidiaries, Harnischfeger Industries owns 80% of the stock of Beloit Corporation, and the remaining 20% is owned by Mitsubishi Heavy Industries, Ltd. Joy in turn has a 10% interest in one of Beloit's subsidiaries, Beloit Canada Ltd. Joy also owns a partial interest in the following foreign companies: Harnischfeger ULC, Datastore Systems Limited, Instem PLC, Equipment Mining and Industrial Finance Limited, Ralliwolf Limited, Equipos Mineros de Monclova, SA de C.V., and Dobson Park LG Limited. Other than the interests listed above, Joy does not have any additional non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.1 LISTING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

Factual Background 2

Federal Mine Safety and Health Review Commission and Tenth Circuit Decisions 3

REASONS FOR GRANTING THE WRIT 6

The Decision Below is in Direct Conflict with Decisions of the Courts of Appeals for the Third Circuit and the Fourth Circuit as to the Definition of "Operator" Under the Mine Act 6

The Decision Below Conflicts with Decisions of This Court 11

TABLE OF AUTHORITIES

CASES **Page**

Community for Creative Non-Violence v. Reid,
490 U.S. 730 (1989) 11

General Elec. v. Gilbert,
429 U.S. 125 (1976) 17

National Indus. Sand Ass'n v. Marshall,
601 F.2d 689 (3d Cir. 1979) 6,8,9,10,15

NLRB v. Amax Coal Co.,
403 U.S. 322 (1981) 11

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (1992) 11,12,13,14

Old Dominion Power Co. v. Donovan,
772 F.2d 92 (4th Cir. 1985) . . . . . passim

Otis Elevator Co. v. Secretary of Labor,
11 FMSHRC 1896 (1989) 4

Otis Elevator Co. v. Secretary of Labor,
921 F.2d 1285 (D.C. Cir. 1990) 6,9

Perrin v. United States,
444 U.S. 37 (1979) 12

Secretary of Labor v. Bulk Transp. Serv., Inc.,
13 FMSHRC 1354, 1991 WL 531465 (F.M.S.H.R.C. 1991) 16

United Energy Serv. Inc. v. Federal Mine Safety & Health Admin.,
35 F.3d 971 (4th Cir. 1994) 16-17

STATUTES

Page

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

Occupational Safety and Health Act of 1977,
29 U.S.C. § 653(b)(1) 17

Federal Mine Safety and Health Act of 1977,

30 U.S.C. § 801-962 . . . . . passim
30 U.S.C. § 802(d): 1-2
30 U.S.C. § 814(g)(1) 3
30 U.S.C. § 816 10

REGULATIONS AND OTHER AUTHORITY

30 C.F.R. § 45.2(c). 5

30 C.F.R. § 48.23(a) 3

30 C.F.R. § 48.28 3

44 Fed. Reg. 47,748 (1979) 7

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review that Court's decision in *Joy Technologies, Inc., Coal Field Operations v. Secretary of Labor, Mine Safety and Health Administration,* No. 95-9540.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 99 F.3d 991 (10th Cir. 1996) and appears as Appendix A (''App. A'') (pp. 1a-16a) hereto. The decision of the Federal Mine Safety and Health Review Commission is reported at 17 FMSHRC 1303, 1995 WL 491079 (F.M.S.H.R.C.) and appears as Appendix B (''App. B'') (pp. 17a-29a) hereto. The opinion of Administrative Law Judge Gary Melick is reported at 15 FMSHRC 2147, 1993 WL 428706 (F.M.S.H.R.C.) and appears as Appendix C (''App. C'') (pp. 30a-37a) hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered November 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely under 28 U.S.C. § 2101(c).

STATUTE INVOLVED

This case involves Section 3(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802(d):

For the purpose of this chapter, the term—

(d) ''operator'' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

STATEMENT OF THE CASE

Factual Background

Joy Technologies Inc. (''Joy'') manufactures and sells mining equipment and replacement parts to mining facilities throughout the United States. Joy does not contract to provide any on site services for the equipment it sells. Rather, the mine operator is fully in charge of assembling and servicing the equipment. Joy's field representatives occasionally visit mine property to offer free advice concerning equipment Joy has sold or to take orders for replacement parts. Thus, Joy contracts to sell only machines and parts.

In this case, Joy sold equipment to the Sandborn Creek Mine in Gunnison County, Colorado operated by the Somerset Mining Company (''Somerset''). Richard McElhannon was the Joy service representative assigned to the Sandborn Creek Mine. Between August 1991 and April 1992, McElhannon visited the Sandborn Creek Mine five times during delivery of Joy equipment or simply while he was in the vicinity of the mine. McElhannon's five written reports concerning these visits confirm that McElhannon merely observed Joy equipment being unloaded or serviced, offered advice to Somerset's maintenance crew, or ordered replacement parts. Somerset's employees exercised complete control over the Sandborn Creek Mine and the equipment thereon.

On April 6, 1992, Joy delivered a new continuous miner, in several sections, to the Sandborn Creek Mine. On April 7, 1992, Somerset's maintenance crew began assembling the continuous

miner in the maintenance shop — approximately one mile away from the portal of the mine. McElhannon was present to offer free technical advice on the assembly of the continuous miner to Somerset's maintenance crew. At one point, McElhannon used a remote control to move the main frame of the continuous miner to help one of Somerset's mechanics pin the miner together.

Mine Safety and Health Administration (''MSHA'') inspector Larry Ramey was also present at the Sandborn Creek Mine on April 7, 1992. Ramey, after observing McElhannon use the remote control, issued an order pursuant to 30 U.S.C. § 814(g)(1) requiring McElhannon to withdraw from the mine for violating the annual refresher training requirements for miners in 30 C.F.R. § 48.28.[1]

Federal Mine Safety and Health Review Commission and Tenth Circuit Decisions

On January 15, 1993, MSHA instituted an administrative proceeding before the Federal Mine Safety and Health Review Commission (''FMSHRC'') by filing a proposal for penalty. Joy filed an answer on February 17, 1993, denying that it was an ''operator'' of the Sandborn Creek Mine subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 (''Mine Act'') and the regulations of the Mine Safety and Health Administration (''MSHA'').

In an opinion issued on October 14, 1993, Administrative Law Judge Gary Melick determined that, even though the record reflected no evidence of any contractual obligation by Joy to perform services at the mine, it was nevertheless an ''independent

[1] 30 C.F.R. § 48.23(a) requires mine operators to provide training. Section 48.28(a) specifies the type of refresher training that is required, including the provision at issue requiring eight hours of annual refresher training. Many of the required elements of the training program are mine-specific such as, for example, the mine's evacuation plan. *See,* 30 C.F.R. § 48.28(3).

contractor'' performing services. According to Judge Melick, Joy was an ''operator'' subject to the Mine Act because Joy performed ''limited but necessary services'' that were ''essential to the extraction of coal.'' App. C at 35a.

On November 22, 1993, FMSHRC granted Joy's petition for discretionary review. On review, Joy again argued that it was not an independent contractor and, thus, not an operator subject to the Mine Act. Specifically, Joy argued it was not an independent contractor because: (1) Joy had no contract to provide services at the Sandborn Creek Mine; (2) Somerset's maintenance crew assembled the continuous miner; and (3) McElhannon, Joy's representative, had no control over any operations at the mine and was at all times subject to supervision by Somerset's maintenance supervisor.

The FMSHRC held, however, that Joy's contacts with the Sandborn Creek Mine were sufficient to treat Joy as a mine ''operator'' under § 3(d) of the Mine Act. Specifically, the FMSHRC purported to apply the test for determining an ''operator'' first articulated in *Otis Elevator Co. v. Secretary of Labor,* 11 FMSHRC 1896, 1902 (1989). That test, as applied to coal mines, requires consideration of the relationship between the contractor's work and the extraction process and the extent of the contractor's presence at the mine. In applying the test, the FMSHRC concluded that Joy was an operator because ''in troubleshooting problems with the Joy continuous miner and shuttle cars, providing technical assistance related to the unloading, assembly and operation of Joy equipment, and securing needed parts, Joy's representative engaged in activities essential to the extraction process.'' App. B at 24a.

On November 5, 1996, the United States Court of Appeals for the Tenth Circuit issued its decision affirming the FMSHRC's ruling. *Joy Technologies, Inc., Coal Field Operations v. Secretary of Labor, Mine Safety and Health Admin.,* 99

F.3d 991 (10th Cir. 1996). *See* App. A at 1a. The Tenth Circuit began its analysis by referencing MSHA's regulations, which define an "independent contractor" as "any person . . . [who] contracts to perform services or construction at a mine." App. A at 6a, quoting 30 C.F.R. § 45.2(c). Although the Tenth Circuit acknowledged that prior precedent and MSHA's own regulations supported Joy's view, it rejected both of Joy's arguments.

First, the Tenth Circuit addressed Joy's argument that it could not be an independent contractor because it did not have a contract to perform services with Somerset. Despite the Tenth Circuit's admission that "Joy's interpretation [is] apparently drawn from the language of MSHA's own regulation," the Tenth Circuit adopted MSHA's suggestion "that a party is an independent contractor within the meaning of Section 3(d) if it performs significant services, under contract or otherwise, on mine property." App. A at 8a, 7a.

The Tenth Circuit also rejected Joy's argument that it could not be an independent contractor because it exercised no control over any mining-related activities. Joy argued that this conclusion was mandated under well-established common law principles which require independent control as a prerequisite to independent contractor status. The Tenth Circuit rejected this common law definition and instead adopted MSHA's anomalous suggestion that by adding the language "performing . . . services at [a] mine," Congress created a broader statutory concept and expanded the traditional definition of independent contractor. App. A at 11a. The Tenth Circuit simply concluded that accepting the common law definition "would thwart the remedial purposes of the Mine Act." App. A at 10a.

The Tenth Circuit next held that Joy was an "operator" as defined in Section 3(d) of the Mine Act. In so doing, the Tenth Circuit explicitly rejected the Fourth Circuit's holding in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985)

and the Third Circuit's holding in *National Indus. Sand Ass'n v. Marshall,* 601 F.2d 689, 704-06 (3d Cir. 1979), electing instead to adopt the broader interpretation of the term ''operator'' sponsored by the D.C. Circuit in *Otis Elevator Co. v. Secretary of Labor,* 921 F.2d 1285 (D.C. Cir. 1990).

In this petition, Joy seeks review of the decision of the Tenth Circuit that expands the definition of ''independent contractor'' beyond its established common law meaning and allows MSHA to increase its agency's jurisdiction through an unsupportably broad definition of ''operator.''

REASONS FOR GRANTING THE WRIT

The Decision Below is in Direct Conflict with Decisions of the Courts of Appeals for the Third Circuit and the Fourth Circuit as to the Definition of ''Operator'' Under the Mine Act.

On the fundamental question of scope of the jurisdictional term ''operator'' as used in Section 3(d) of the Mine Act, the Tenth Circuit ''decline[d] to adopt'' the holdings of the Fourth Circuit in *Old Dominion Power Co. v. Donovan,* 772 F.2d 92 (4th Cir. 1985) and of the Third Circuit in *National Indus. Sand Ass'n v. Marshall,* 601 F.2d 689 (3d Cir. 1979). Instead, it elected to endorse the reasoning of the D.C. Circuit in *Otis Elevator Co. v. Secretary of Labor,* 921 F.2d 1285 (D.C. Cir. 1990), a decision that had, itself, explicitly rejected the Fourth Circuit's analysis in *Old Dominion* and the Third Circuit's analysis in *National Indus. Sand,* 921 F.2d at 1289-90.

In *Old Dominion,* an electric utility company sought review of FMSHRC's decision that it was an operator within Section 3(d) of the Mine Act. MSHA had issued a citation to the utility

after one of its employees was electrocuted while on mine property to check a faulty meter. The utility's relationship to the coal mine was the sale of electric power. The Fourth Circuit reversed FMSHRC's determination and held that the utility company was not an operator for purposes of the Mine Act because it was not ''any independent contractor performing services or construction at such mine.'' *Old Dominion,* 772 F.2d at 96 (quoting 30 U.S.C. § 802(d)). The Fourth Circuit explained that the ''legislative history of § 3(d) of the Mine Act . . . demonstrates that Congress intended to include within the Mine Act's definition of 'operator' only those independent contractors who are involved in mine construction or extraction and who have a 'continuing presence' at the mine.'' *Old Dominion,* 772 F.2d at 96. In support of its holding, the Fourth Circuit noted that the Committee Report had explained that by expanding the term ''operator,'' ''[i]t is the Committee's intent to thereby include individuals or firms who are engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process . . . '' *Id.* (quoting S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414). The Fourth Circuit also pointed to proposed regulations on independent contractors wherein MSHA stated that the definition of ''operator'' requires ''substantial participation in the running of the mine'' and that a ''similar degree of involvement in mining activities is required of independent contractors before they are designated as operators.'' *Old Dominion,* 772 F.2d at 97 n. 6 (quoting 44 Fed. Reg. 47,748 (1979)). Although MSHA did not explicitly incorporate its proposed criteria in the final rule, the Fourth Circuit noted that the

> unequivocal explication of the history accompanying the proposed rule . . . remains MSHA's principal pronouncement on the history of § 3(d), and further confirms our conclusion that Congress intended to define as ''operators'' only those independent contractors who are engaged in

> mine construction or extraction and who have a ''continuing presence'' at a mine.

Old Dominion, 772 F.2d at 97 n. 6.

The Fourth Circuit declined to defer to the agency's proffered interpretation of ''operator'' as including all independent contractors: ''MSHA's position contradict[ed] its earlier interpretation of § 3(d) as expressed in its proposed regulations,'' and, therefore, it was ''not entitled to the deference usually given by [the] Court to agency interpretations of the statutes they are commissioned to enforce.'' *Old Dominion,* 772 F.2d at 97. In conclusion, the Fourth Circuit rejected MSHA's broad definition of ''operator'' which would have expanded MSHA's jurisdiction to include utility companies ''whose sole relationship to the mine is the sale of electricity.'' *Id.* at 99. Instead, the Fourth Circuit held that ''operator'' included ''only those independent contractors who are involved in mine construction or extraction or who have a 'continuing presence' at the mine.'' *Old Dominion,* 772 F.2d at 96.

In reaching its decision in *Old Dominion,* the Fourth Circuit relied on the Third Circuit's holding in *National Indus. Sand Ass'n v. Marshall,* 601 F.2d 689 (3d Cir. 1979). In that case, a group of mine operators challenged the validity of the very training regulations at issue here. Specifically, the plaintiffs challenged the Secretary's right to include fewer than all independent contractors. In rejecting this argument and in upholding the training regulations, the Third Circuit recognized that not all independent contractors working at mines are operators:

> The reference made in the statute only to independent contractors who ''perform[ ] services or construction'' may be understood as indicating, however, that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be

> difficult to conclude that services were being performed. Such a reading of the statute is given color by the fact that other persons deemed operators must "operate[ ], control[ ], or supervise[ ]" a mine. Designation of such other persons as operators thus requires substantial participation in the running of the mine; the statutory text may be taken to suggest that a similar degree of involvement in mining activities is required of independent contractors before they are designated as operators.

Nat'l Industrial Sand Ass'n, 601 F.2d at 701.

In contrast to the Third and Fourth Circuits' consideration of an independent contractor's contacts to a mine in determining its status as an "operator," the D.C. Circuit opted to follow an approach similar to the one employed by the Tenth Circuit in the instant case. In *Otis Elevator Co. v. Secretary of Labor,* 921 F.2d 1285 (D.C. Cir. 1990), a MSHA inspector issued two citations to Otis Elevator ("*Otis*") employees who were present on mine property servicing an underground elevator used to carry miners into the mine. *Otis* challenged the citations arguing that, although an independent contractor, it is not an "operator" because "the clause 'who operates, controls, or supervises a coal or other mine' describes or qualifies each noun in the preceding phrase" thereby qualifying the succeeding phrase "any independent contractor performing services or construction at such mine." *Otis,* 921 F.2d at 1289. The D.C. Circuit interpreted the statute broadly and focused its analysis solely on the term "any" and concluded "the phrase 'any independent contractor performing services . . . at [a] mine' means just that — any independent contractor performing services at a mine." *Otis,* 921 F.2d at 1290.

In so doing, the D.C. Circuit explicitly rejected the holdings of the Third Circuit in *National Industrial Sand* and the Fourth Circuit in *Old Dominion.*

The holdings of the Fourth and Third Circuits are directly in conflict with the D.C. Circuit's holding in *Otis* as well as the Tenth Circuit's holding in the instant case. Neither the Fourth nor Third Circuit include all independent contractors within the definition of operator. Both Circuits require a degree of involvement in the mining process before an independent contractor may be subjected to MSHA's jurisdiction.

The uncertainty and inconsistency confronting the mining industry is demonstrated in this case. If Joy had delivered the continuous miner to a coal mine located within the Third or Fourth Circuit, it would not have been subjected to MSHA's jurisdiction and regulations. To the contrary, under the Fourth Circuit's reasoning in *Old Dominion* it would have been outside the regulatory scheme because its sole relationship to the mine was the sale of goods, *Old Dominion,* 772 F.2d at 99, or, under the Third Circuit's instruction in *National Indus. Sand Ass'n,* its five contacts in a nine month period were "so infrequent or de minimis" that they would not constitute "services" as required by the Section 3(d) definition of operator. *National Indus. Sand Ass'n,* 601 F.2d at 701. Similar sales into the Tenth Circuit, however, categorize Joy as an "independent contractor" and automatically render it an operator under the Mine Act. App. A at 14a. The application of an agency's regulations should not turn upon the federal circuit in which a party does its business.

The problem presented by the conflict among the circuits in this case is further exacerbated because one of the conflicting circuits is the D.C. Circuit. Under the Mine Act, judicial review of an FMSHRC decision can be sought before the circuit court covering where the violation allegedly occurred or before the D.C. Circuit. 30 U.S.C. § 816. Thus, in addition to the lack of uniformity among the circuits, a losing party can engage in forum shopping. This presents another additional reason why this conflict should be resolved by this Court.

Such uncertainty is inimical to the federal interest in ensuring uniform compliance with federal safety regulations. In light of this direct circuit court conflict over the definition of the jurisdictional term ''operator'' as used in the Mine Act and its corresponding effect on agency jurisdiction, review by this Court is warranted.

The Decision Below Conflicts with Decisions of This Court.

In addition to the clear conflict that exists between the decisions of the Third and Fourth Circuits and the decisions of the District of Columbia and Tenth Circuits, discussed *supra,* the Tenth Circuit's decision conflicts with numerous prior decisions of this Court on how to determine the meaning of terms with established meanings such as the term ''independent contractor.''

In interpeting that term under FMSHA, the Tenth Circuit rejected the use of its common law meaning in favor of ''a new statutory concept that must be interpreted, in the first instance, by the agency responsible for enforcing the provision.'' App. A at 11a. This creation of — or deference to an agency's creation of — a ''broader'' statutory concept conflicts with a long line of cases of this Court recognizing the ''well established'' principle that, unless a statute otherwise dictates, a court in interpreting the reach of the statute should use the settled meaning under common law. *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322-23 (1992) (interpreting the term employee under the Employee Retirement Income Security Act of 1974); *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 739 (1989) (interpreting the term ''employee'' and ''scope of employment'' under the Copyright Act of 1976); *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329 (1981) (interpreting ''trustee'' under the Labor

Management Relations Act and instructing that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (interpreting the term "bribery" under the Travel Act and advising that "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning").

As this Court explained in *Darden*, quoting *Reid:*

> "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . . In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. See, *e.g., Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959) (*per curiam*); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915)." 490 U.S., at 739-740 (internal quotation marks omitted).

While we supported this reading of the Copyright Act with other observations, the general rule stood as independent authority for the decision.

So too should it stand here. ERISA's nominal definition of "employee" as "any individual employed by an employer," 29 U.S.C. § 1002(6), is completely circular and explains nothing. As for the rest of the Act, Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would

> thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an "employee" under ERISA . . .

Darden, 503 U.S. at 322-23.

Although the Tenth Circuit cited *Darden* and this principle, it ignored the teachings of this Court and instead opted for "deference" to an agency. The Tenth Circuit used the qualifying phrase "performing services at a mine" to broaden, not limit, the statutory term.

In accepting the Secretary's argument for a "broader statutory concept," the Tenth Circuit initially noted that, in amending Section 3(d) of the Mine Act in 1977 to add the definition of independent contractor at issue, "Congress did not state whether the term 'independent contractor' should be construed narrowly under the common law or given a more expansive interpretation, as it has done in other statutes." App. A at 10a. Having made this observation, the Tenth Circuit should have ended its analysis in light of this Court's long line of authority that, if there is no definition or no helpful definition, the interpretive presumption or "general rule" is that Congress incorporated "the established meaning of these terms." *See Darden,* 503 U.S. at 323 and *Reid,* 490 U.S. at 739-40.

In attempting to justify its rejection of this interpretive presumption in favor of a term's accumulated settled meaning and its adoption of a broader statutory concept, the Tenth Circuit relied upon two factors: (1) "the broader statutory language that Congress chose" and (2) "the remedial purposes of the Mine Act." App. A at 10a. Neither basis is consistent with this Court's prior precedent nor justifies such a sweeping expansion of MSHA's jurisdiction.

The Tenth Circuit begins, as it should, by examining the statutory language. Citing *Darden,* the Tenth Circuit explains:

> We are persuaded that the phrase ''independent contractor performing services . . . at [a] mine'' expands the meaning of ''independent contractor'' to cover ''some parties who might not qualify as such under a strict application of traditional agency law principles.'' *Darden,* 503 U.S. at 325-26. In *Darden,* the Supreme Court adopted a common law test for determining who is an ''employee'' under the Employee Retirement Income Security Act of 1974 (ERISA), concluding that ERISA contained no language to suggest that Congress intended the term to have a meaning other than the established meaning at common law. In this case, Congress did not choose the established term ''independent contractor,'' but rather it chose the new phrase ''independent contractor performing services or construction at [a] mine.''

Id.

The Tenth Circuit then ''explains'' Congressional intent by noting, without citation, that ''in choosing this phrase, Congress did not intend to incorporate the common law . . . but intended to establish a new statutory concept that must be interpreted, in the first instance, by the agency responsible for enforcing the provision.'' *Id.*

Contrary to the Tenth Circuit's discovery of a new, broader statutory concept, the use of the qualifying phrase ''performing services or construction at [a] mine'' limits rather than expands the term ''independent contractor.'' It indicates that only some subset of independent contractors are included with Section 3(d)'s definition of a covered operator. Indeed, both the Fourth Circuit and the Third Circuit have recognized this very point, *i.e.* that the phrase qualifies and does not expand the term ''independent contractors.'' The Fourth Circuit explained:

> [T]he Third Circuit has construed the new definition of "operator" and concluded that not all independent contractors working at a mine site are to be regarded as operators. As that court explained:
>
> > The reference made in the statute only to independent contractors who "perform[ ] services or construction" may be understood as indicating, however, that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed. Such a reading of the statute is given color by the fact that other persons deemed operators must "operate[ ], control[ ], or supervise[ ]" a mine. Designation of such other persons as operators thus requires substantial participation in the running of the mine; the statutory text may be taken to suggest that a similar degree of involvement in mining activities is required of independent contractors before they are designated as operators.
>
> National Indus. Sand Ass'n. v. Marshall, 601 F.2d 689, 701 (3d Cir. 1979) (emphasis added) (footnote omitted). We agree with this analysis and adopt it.

Old Dominion, 99 F.3d at 97.

The Tenth Circuit's use of a qualifying phrase to reject the term's common law meaning and to broaden the Mine Act's coverage is unsupported and unsupportable. It is contrary to the admonition of this Court that terms should be given their normal common law meaning and contrary to the earlier interpretations of the Third and Fourth Circuits.

As the second justification for rejecting this Court's admonition to use a term's common law meaning, the Tenth Circuit

argues "that a narrow common law test would thwart the purposes of the Mine Act." App. A at 11a. According to the Tenth Circuit, a more traditional interpretation of the term would allow parties "to avoid regulation by structuring their relationships with a mine to avoid 'controlling' the provision of services." App. A at 12a. This is a classic red herring. In enforcement proceedings, the focus is on the actual reality of an independent contractor's services, not on the terms of any given contract. Further, even if the focus were on the contractual terms and not on what actually happened, no contractual terms between private parties could alter the scope of federal legislation. A contract between the parties may be evidence of independent contractor status or the performance of services by an independent contractor, but it is not a controlling document and cannot change the jurisdiction of MSHA. To put it simply, no matter what any private contract provides, an independent contractor who performs services at a mine is covered; one who does not, is not.

Although the Tenth Circuit suggests that a broad interpretation is necessary to protect employees, under the Federal Mine Safety and Health Act, the operator of a mine is strictly liable for any violations of the mine safety regulations. *See Secretary of Labor v. Bulk Transp. Serv., Inc.*, 13 FMSHRC 1354, 1991 WL 531465 (F.M.S.H.R.C. 1991). Indeed, in this case, the owner of the mine received a similar citation to that received by Joy. Thus, any alleged unsafe condition here was not outside any government regulation. MSHA could and did cite the operator of the mine who must correct the hazard. Thus, there simply is no hole in the regulatory fabric to justify a departure from the normal rules of statutory interpretation.

Further, even if there were a hole in the regulatory fabric, the Tenth Circuit's analysis does not even acknowledge that, if MSHA did not apply, OSHA would. *See United Energy Serv., Inc. v. Federal Mine Safety & Health Admin.*, 35 F.3d 971, 977

(4th Cir. 1994) (MSHA preempts regulatory jurisdiction of OSHA); *Old Dominion Power Co. v. Donovan*, 772 F.2d at 99 (holding electric utility is covered by OSHA not MSHA); *see also* Section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(1) (providing that OSHA does not apply where another federal agency has exercised its statutory authority). The Tenth Circuit's decision never even mentions this alternative to MSHA jurisdiction. Employees are not left unprotected.

Thus, any liberal interpretation or deference to an agency's interpretation must give way to the common law meaning of the words of the statute. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976) (declining to accept the EEOC's construction of the statute and instead adopting "what seems to [the Court] to be the 'plain meaning' of the language used by Congress . . . ."). The Tenth Circuit's rejection of the common law meaning of the statutory definition determining MSHA's jurisdiction is contrary to the long line of decisions of this Court requiring that, unless a statute otherwise dictates, a term be given its normal common law meaning.

CONCLUSION

The acknowledged conflict among the circuits on the jurisdiction of MSHA necessitates review by this Court. Four different circuits have arrived at different and inconsistent standards to determine MSHA jurisdiction. Litigants will not be able to look at a uniform body of law on the reach of this important federal safety legislation. The Federal Mine Safety and Health Review Commission will be faced with countless jurisdictional arguments because the parties will not be able to determine whether or not there is MSHA jurisdiction. Persons attempting to implement safety programs will not be able to determine whether MSHA or OSHA regulations apply. Only this Court can resolve

the conflicts presented by the four different interpretations of MSHA's juridiction.

Petitioner accordingly requests that this Court grant certiorari in this case.

Respectfully submitted,

*W. SCOTT RAILTON
W. THOMAS MCGOUGH, JR.
PATRICK W. RITCHEY
REED SMITH SHAW & McCLAY
8251 Greensboro Drive,
Suite 1100
McLean, VA 22102-3844
(703) 734-4610
Counsel of Record for Petitioner

Of Counsel:
LAWRENCE J. LEPIDI
Senior Litigation Counsel
Joy Technologies Inc.
177 Thorn Hill Road
Warrendale, PA 15086

APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOY TECHNOLOGIES, INC.,
COAL FIELD OPERATIONS,
Petitioner,

v.

SECRETARY OF LABOR, MINE
SAFETY AND HEALTH
ADMINISTRATION,
Respondents.

No. 95-9540

ON PETITION FOR REVIEW OF A DECISION BY THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

W. Scott Railton (Christopher L. Killion and Marjorie P. Alloy with him on the brief), Reed, Smith, Shaw & McClay, McLean, Virginia, appearing for the Petitioner.

Robin A. Rosenbluth, Attorney (Thomas S. Williamson, Jr., Solicitor of Labor, Edward P. Clair, Associate Solicitor, and W. Christian Schumann, Counsel, Appellate Litigation, with her on the brief, U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, appearing for the Respondents.

Before PORFILIO, TACHA, and BRORBY, Circuit Judges.

TACHA, Circuit Judge.

In this petition for review, we must examine the regulatory jurisdiction of the Mine Safety and Health Administration (MSHA) under the Federal Mine Safety and Health Act of 1977 (Mine Act), codified as amended at 30 U.S.C. §§ 801-962. Joy Technologies, Inc., (Joy) manufactures and sells mining equipment and sends service representatives onto mine property in connection with the sale of its products. In enforcing a safety regulation promulgated under the Mine Act, the Federal Mine Safety and Health Review Commission (FMSHRC) upheld the assessment of a penalty by MSHA against Joy for its failure to provide required annual refresher training to its service representatives. On appeal, Joy contests MSHA's jurisdiction to assess the penalty, arguing that (1) Joy is not an "independent contractor" because it did not have a contract for services and did not control any mining related operations; and (2) Joy is not an "operator" because it was not sufficiently involved in the extraction process and was not continually present at the mine. We have jurisdiction over this petition for review pursuant to 30 U.S.C. § 816(a) and affirm.

BACKGROUND

I. Federal Mine Safety and Health Act

In 1969, Congress enacted the Federal Coal Mine Health and Safety Act (Coal Mine Act), Pub. L. No. 91-173, 83 Stat. 742, which subjected to regulation every coal mine affecting commerce and every operator of such coal mine. § 4, 83 Stat. at 744. Section 3(d) of the Coal Mine Act defined an "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal mine." § 3(d), 83 Stat. at 744. Although section 3(d) did not specifically include independent contractors

within the definition of "operator," courts interpreted this provision to include independent contractors whenever the contractors, in performing services at a coal mine, controlled or supervised all or part of the mine. *See Association of Bituminous Contractors, Inc. v. Andrus,* 581 F.2d 853, 860-62 (D.C. Cir. 1978) ("[A]n independent construction company, which operates, controls, or supervises excavation work . . . is an 'operator of a coal mine' within the meaning and purposes of [the Coal Mine Act]."); *Bituminous Coal Operators' Ass'n v. Secretary of Interior,* 547 F.2d 240, 246 (4th Cir. 1977) ("[W]hen a company exercises control and supervision over a specific area of land while it is constructing one of the facilities mentioned in the act, it is functioning as an operator of a coal mine.").

In 1977, in order to improve and promote safety and health in the nation's mines, Congress amended the Coal Mine Act, renaming it the Federal Mine Safety and Health Act. *See* Pub. L. No. 95-164, §§ 101, 102(a), 91 Stat. 1290. Congress broadened section 3(d) of the Coal Mine Act to include in the definition of operator "any independent contractor performing services or construction at [a] mine " 30 U.S.C. § 802(d). The Secretary of Labor, through MSHA, an agency within the Department of Labor, *see* 29 U.S.C. § 557a, issued a regulation defining an independent contractor as "any person . . . [who] contracts to perform services or construction at a mine." 30 C.F.R. § 45.2(c).

II. Procedural History

On April 6, 1992, Joy Technologies delivered a new continuous miner to the Sanborn Creek Mine, operated by Somerset Mining Company (Somerset) in Gunnison County, Colorado. On this occasion, as well as on at least four previous occasions during 1992, Dick McElhannon, a Joy service representative, visited the Sanborn Creek Mine and performed a variety of services, including assuring that Joy's equipment was delivered in proper

condition, advising and assisting in repairs, and procuring necessary replacement parts. McElhannon's own reports show that he helped Somerset's maintenance staff in "troubleshooting" problems with the equipment both above ground in the mine's maintenance shop and below ground in the mine. McElhannon, however, did not personally unload, assemble, or service any machine. The parties do not dispute that Joy did not have a service contract with Somerset The only contracts between the parties were for the sale of parts and new equipment.

On April 7, 1992, an MSHA inspector entered the maintenance shop while Somerset's maintenance crew was assembling the continuous miner. The inspector observed McElhannon using a remote control to move the main frame of the continuous miner to help a Somerset mechanic pin the machine together. The inspector believed that McElhannon was operating the remote control in a hazardous manner. When the inspector determined that McElhannon had not received eight hours of annual refresher training as required of all miners under 30 C.F.R. § 48.28(a), the inspector issued a citation against Joy.

Joy contested MSHA's citation and civil penalty proposal, and a hearing was held before an administrative law judge on July 20, 1993. The ALJ issued a decision affirming the violation and assessing a civil penalty of $100 against Joy. *Joy Technologies, Inc.*, 15 F.M.S.H.R.C. 2147, 2152 (1993). Thereafter, FMSHRC granted Joy's petition for review, and on August 14, 1995, FMSHRC issued a final decision affirming the ALJ's decision that Joy was both an independent contractor and an operator within the meaning of the Mine Act. *Joy Technologies, Inc.*, 17 F.M.S.H.R.C. 1303 (1995). Relying on a previous decision, *Bulk Transp. Servs., Inc.*, 13 F.M.S.H.R.C. 1354, 1358 n.2 (1991), FMSHRC concluded that Joy did not need a specific service contract with Somerset to qualify as an independent contractor. FMSHRC did not address Joy's argument that control was

required for independent contractor status. FMSHRC further concluded that Joy was an operator, applying the two-part test set forth in FMSHRC's *Otis Elevator Co.* line of cases: *Otis Elevator, Inc.*, 11 F.M.S.H.R.C. 1896 (1989) *(Otis I)*, and *Otis Elevator Inc.*, 11 F.M.S.H.R.C. 1918 (1989) *(Otis II), aff'd on other grounds,* 921 F.2d 1285 (D.C. Cir. 1990). Under this test, FMSHRC examines (1) "the independent contractor's proximity to the extraction process" and (2) "the extent of [the contractor's] presence at the mine." *Otis I*, 11 F.M.S.H.R.C. at 1902. Applying this test, the Commission found that Joy was an operator because it "engaged in activities essential to the extraction process" and that "Joy's contacts with the mine were more than de minimis." *Joy Technologies, Inc.*, 17 F.M.S.H.R.C. at 1307-08.

DISCUSSION

I. Standard of Review

At the outset, we address the question of the appropriate standard of review to apply to MSHA's interpretation of section 3(d) of the Mine Act. In reviewing MSHA's interpretation, we must first inquire "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If a statute's meaning is clear and unambiguous, the inquiry ends. *Id.* at 842-43. If a statute is silent or ambiguous on a specific issue, we give deference to the interpretation adopted by the agency entrusted with administering the statute. *Id.* at 842-45; *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995); *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447, 449-50 (10th Cir. 1990); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1415 (10th Cir. 1984). We must uphold the agency's interpretation as long as that interpretation is one of the permissible interpretations the agency could have selected.

Chevron, 467 U.S. at 843; *Thunder Basin*, 56 F.3d at 1277; *Utah Power & Light Co.*, 897 F.2d at 450. If a regulation promulgated by the agency is ambiguous, an interpretation "which is reasonable and consistent with the statute . . . is to be preferred." *United Telecommunications, Inc. v. Commissioner*, 589 F.2d 1383, 1390 (10th Cir. 1978), cert. denied, 442 U.S. 917 (1979). If the Secretary of Labor and FMSHRC have conflicting interpretations of the Mine Act, the Secretary's interpretations rather than FMSHRC's are entitled to deference under *Chevron*. *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990); *Secretary of Labor v. Cannelton Industries*, 867 F.2d 1432, 1435 (D.C. Cir. 1989). We next apply these principles to MSHA's construction of section 3(d) to determine whether Joy qualifies as both an "independent contractor" as well as an "operator" under the Mine Act.

II. Joy's status as an "Independent Contractor"

We first determine whether Joy is an independent contractor under section 3(d) of the Mine Act. Section 3(d) states the following:

> "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine *or any independent contractor performing services or construction at such mine.*

30 U.S.C. § 802(d) (emphasis added). MSHA's regulations implementing section 3(d) define an "independent contractor" as any person or business "that contracts to perform services or construction at a mine." 30 C.F.R. § 45.2(c). In contesting MSHA's jurisdiction, Joy argues that it is not an independent contractor under section 3(d) because: (1) it did not have a specific service contract with the mine and (2) it did not control the performance of any operations or services at the mine.

A. Service Contract

Joy relies on the agency definition of ''independent contractor'' and argues that it is not an independent contractor because it does not have a contract ''to perform services'' with Somerset. Joy argues that the only contracts between Somerset and Joy were for the sale of goods. MSHA asserts that the language in the regulation referring to ''contracts to perform services'' is not limited to specific service contracts but encompasses services performed incidental to a contract of sale. MSHA has concluded that a party is an independent contractor within the meaning of section 3(d) if it performs significant services, under contract or otherwise, on mine property. Because we find that neither Congress nor MSHA's definition has spoken to the precise question of whether a service contract is required, we defer to MSHA's reasonable interpretation that such a contract is not required.

Whatever clarity exists from the agency's definition of ''independent contractor,'' standing alone, is rendered ambiguous when the definition is read in conjunction with the language, history, and purpose of the statutory provision it is meant to implement. The statutory language in section 3(d) of the Mine Act is silent on the meaning to be accorded to the term ''independent contractor'' in the phrase ''independent contractor performing services . . . at [a] mine.'' The statute itself neither mandates nor precludes the agency's interpretation that a specific service contract is not required.

In addition, the legislative history suggests that a specific contractual relationship is not required for independent contractor status. A Senate report accompanying the Mine Act, which amended the definition of ''operator'' to include the independent contractor language, states that Congress intended to include within the act those ''who are engaged in construction at [a] mine, or who may be, *under contract or otherwise,* engaged in the extraction process for the benefit of the owner or lessee of

the property." S. Rep. No. 95-181, 95th Cong., 1st Sess. 14, *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414 (emphasis added) (hereinafter Senate Report). FMSHRC, in applying the statute, has consistently stated that "[o]ur focus is on the actual relationships between the parties, and is not confined to the terms of their contracts." *Joy Technologies, Inc.*, 17 F.M.S.H.R.C. at 1306 (citing *Bulk Transp. Servs., Inc.* 13 F.M.S.H.R.C. at 1358, n.2 (1991)).

Finally, an interpretation of "independent contractor" that excludes all persons or businesses because they do not have a service contract would be at odds with the purpose of the Mine Act. We are mindful of the rule that " 'a regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.' " *Emery Mining Corp.*, 744 F.2d at 1414 (quoting *Trustees of Ind. Univ. v. United States*, 618 F.2d 736, 739 (Cl. Ct. 1980)). Under Joy's interpretation, a party performing services at a mine could avoid the requirements of the Act by not setting forth the terms of its relationship with the mine in a contract. Such an interpretation would produce a result which fails to protect the safety and health of the nation's miners, the primary purpose of the Mine Act. We refuse to give effect to an interpretation of a regulation which is not "reasonable and consistent with the statute" that the regulation is meant to implement. *United Telecommunications, Inc.*, 589 F.2d at 1390. Joy's interpretation, although apparently drawn from the language of MSHA's own regulation, would do just that. Thus, we conclude that in light of the language, history and purpose of the Mine Act, a service contract is not required for independent contractor status under section 3(d).

B. Control

Joy also asserts that it is not an independent contractor under section 3(d) because it did not have authority to control any mining-related operations and that control is a prerequisite

under the statute. Joy argues that "independent contractor" is an established common law term and that under the common law, an independent contractor is a person who contracts to perform work for another but is "not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." Restatement (Second) of Agency § 2(3). Joy argues that at all times, McElhannon did not control any operations but merely gave advice or assistance while Somerset's own maintenance crew performed the work associated with the machinery. Joy contends that we should not defer to the agency's construction of a term "if it is based on general common law principles rather than the agency's expertise." *Board of County Comm'rs v. Isaac,* 18 F.3d 1492, 1497 (10th Cir. 1994).

The Secretary, on the other hand, argues that in amending section 3(d) of the Mine Act to include "independent contractors performing . . . services at [a] mine," Congress did not merely incorporate a common law term but created a broader statutory concept. The Secretary maintains that a broad interpretation of independent contractor, unmoored from its common law meaning, is consistent with the expansive statutory language "independent contractor performing services at a mine" and is necessary to accomplish the remedial purposes of the statute. *See Cannelton Indus.,* 867 F.2d at 1437 (stating that the primary purpose of the Mine Act is to "protect mining's most valuable resources—the miner"). Accordingly, the Secretary argues that the statutory provision must be interpreted under the remedial purposes of the Mine Act, and not under traditional agency law principles. *See id.* (stating that Congress intended the Mine Act to be liberally construed to accomplish its remedial purposes); *Cyprus Indus. Minerals Co. v. FMSHRC,* 664 F.2d 1116, 1118 (9th Cir. 1981) (same).

We agree with the Secretary and decline to adopt a common law test for determining who is an "independent contractor" under the Mine Act. In amending section 3(d) of the Mine Act, Congress did not state whether the term "independent contractor" should be construed narrowly under the common law or given a more expansive interpretation, as it has done in other statutes. *See, e.g., United States v. W.M. Webb, Inc.*, 397 U.S. 179, 182-83 (1970) (noting that in the Federal Insurance Contributions Act, Congress intended "employee" to be defined "under the usual common law rules"); *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996) (noting that in the Migrant and Seasonal Agricultural Workers Protection Act, Congress stated that "employee" and "independent contractor" should "not be construed in their limited common law sense"). Absent such direction by Congress, we must examine both the language and purposes of the statute in deciding whether to limit the term "independent contractor" to its common law meaning. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (stating that a term should be given its common law meaning " 'unless the statute otherwise dictates' " or unless such a construction "would thwart the congressional design or lead to absurd results") (citations omitted). We conclude that a strict adherence to the common law distinction between an employee and an independent contractor is inconsistent with the broader statutory language that Congress chose and would thwart the remedial purposes of the Mine Act. Accordingly, we agree with the Secretary that a broader construction is appropriate.[1]

---

[1]In other contexts, courts have often been asked to construe the meaning of the term "employee" where the statute containing the term "does not helpfully define it." *Darden*, 503 U.S. at 322. In some cases, courts have given the term an expansive meaning, consistent with "the history, terms and purposes of the legislation." *NLRB v. Hearst*, 322 U.S. 111, 123 (1944) (National Labor Relations Act); *see also United States v. Silk*, 331 U.S. 704, 711-12 (1947) (Social Security Act); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947)

(Continued on next page)

As with all matters of statutory interpretation, we begin with the language of the statute. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). We are persuaded that the phrase "independent contractor performing services . . . at [a] mine" expands the meaning of "independent contractor" to cover "some parties who might not qualify as such under a strict application of traditional agency law principles." *Darden*, 503 U.S. at 325-26. In *Darden*, the Supreme Court adopted a common law test for determining who is an "employee" under the Employee Retirement Income Security Act of 1974 (ERISA), concluding that ERISA contained no language to suggest that Congress intended the term to have a meaning other than the established meaning at common law. In this case, Congress did not choose the established term "independent contractor," but rather it chose the new phrase "independent contractor performing services or construction at [a] mine." We conclude that in choosing this phrase, Congress did not intend to incorporate the common law framework for distinguishing between independent contractors and employees, but intended to establish a new statutory concept that must be interpreted, in the first instance, by the agency responsible for enforcing the provision. This broader construction is supported by the well-settled conclusion that "Congress intended the [Mine] Act to be liberally construed" to protect the health and safety of miners. *Cannelton Indus.*, 867 F.2d at 1437.

We also conclude that a narrow common law test would thwart the purposes of the Mine Act. Under such a test, parties

---

(Continued)

(Fair Labor Standards Act); *Antenor*, 88 F.3d at 929 (Agricultural Workers Protection Act). In other cases, courts have adopted a common-law test for determining who qualifies as an "employee," concluding that the language of the statute precluded a broader meaning. *See Darden*, 503 U.S. at 323 (Employee Retirement Income Security Act); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740-41 (1989) (Copyright Act).

would be able to avoid regulation by structuring their relationships with a mine to avoid "controlling" the provision of services. Such "contracts, however 'skillfully devised,' " *Silk*, 331 U.S. at 715 (citation omitted), should not be permitted to allow a party to escape regulation. Although Congress chose to regulate independent contractors, the traditional counterpart to employees, there is no indication that Congress meant to regulate independent contractors but to exempt employees, as those terms are understood at common law. In a regulatory setting such as this, there is little reason to enforce the strict distinction between employees and independent contractors that is paramount at common law. The purpose of including independent contractors within the scope of the Mine Act was not to assign liability to one class (independent contractors) while exempting the other (employees), but to broaden the reach of the act to include all those whose presence at a mine affects the health and safety of miners. Moreover, under a common law test, there is "no shorthand formula or magic phrase" that can easily be applied to distinguish between an employee and an independent contractor. *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968). Under such a test, simplicity in enforcing the Mine Act's health and safety regulations would be replaced with difficulty, as MSHA is required to apply the cumbersome common law rules each time it encounters a party performing services at a mine. Such difficulty would impede the Mine Act's effectiveness and thus thwart the accomplishment of its purposes. Accordingly, we refuse to limit the term to its narrow common law meaning and defer to the agency's reasonable interpretation that control is not a prerequisite for independent contractor status under the statute.[2]

---

[2]Even if we were to construe the term "independent contractor" under "the general common law of agency," *Reid*, 409 U.S. at 740, Joy would qualify as an independent contractor. Under a common law test, Joy could escape

(Continued on next page)

Joy, nonetheless, argues that MSHA's present interpretation regarding control is not entitled to deference under *Chevron* because, in 1979, MSHA issued a conflicting proposal. The proposal stated that "in identifying independent contractors as operators, the critical condition is control over the area of the mine where the work is being performed." 44 Fed. Reg. 47,746, 47,746-53 (1979). In the final rule adopted in 1980, however, MSHA abandoned its earlier emphasis on control and in the preamble to the final rule concluded that "holding *all* independent contractors responsible for their violations will in the majority of instances improve the overall safety and health of miners." 45 Fed. Reg. 44,494, 44,495 (1980) (emphasis added).

We see no reason to refuse to defer to the agency's long-standing interpretation merely because it once issued and then retracted a conflicting proposal. "[A]n agency is entitled to consider alternative interpretations before settling on the view it considers most sound. *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 845 (1986) (deferring to an agency's long-standing interpretation despite the agency's earlier inconsistent proposal). *But see Old Dominion Power Co. v. Donovan,* 772 F.2d 92, 97 & n.6 (4th Cir. 1985) (refusing to defer to MSHA's interpretation of section 3(d) of the Mine Act in part because of its earlier inconsistent proposal).

In sum, we conclude that MSHA's interpretation—that independent contractor status is to be based not on the existence

---

(Continued)

regulation only by qualifying as an employee, i.e., a non-independent contractor. Although McElhannon, Joy's service representative, may not have controlled the provision of services or maintenance at the mine, Somerset did not supervise or control McElhannon. Thus, McElhannon cannot be characterized as an employee of Somerset under either the multi-factor test used at common law, *see* Restatement (Second) Agency § 220, or Joy's "control" test. In light of the undisputed facts, McElhannon was not an employee of Somerset.

of a service contract or control, but on the performance of significant services at the mine—is a reasonable construction of the statute entitled to deference. The 1977 amendments to the Coal Mine Act broadened the reach of the statute to include persons who are present at a mine performing services, but who do not qualify as an "owner, lessee, or other person who operates, controls, or supervises a . . . mine." 30 U.S.C. § 802(d). Substantial evidence supports the ALJ and the Commission's factual finding that Joy's service representative performed significant services at the mine. Accordingly, we agree with FMSHRC that Joy is an independent contractor within the meaning of section 3(d) of the Mine Act.

C. Joy's status as an "Operator"

We next determine whether the term "operator" as defined in section 3(d) of the Mine Act includes all independent contractors performing services at a mine or whether it exempts from regulation certain independent contractors, like Joy, whose only connection with a mine is limited to providing services in connection with the sale of goods. Joy asserts that we should adopt the position set forth in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985). In *Old Dominion*, the Fourth Circuit Court of Appeals concluded that in amending the Coal Mine Act to include "independent contractors performing services . . . at [a] mine," Congress intended to include within the definition of "operator" only those independent contractors "who are engaged in . . . the extraction process, and who have a 'continuing presence' at the mine." *Id.* at 97; *see also National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 704-06 (3d Cir. 1979) (upholding proposed MSHA regulations that would have treated only certain independent contractors performing services at a mine as operators). *Old Dominion* derived these two limitations from several pieces of legislative history that the court concluded showed Congress's intent to regulate only those contractors with

a sufficient nexus to mining who are at the mine more than occasionally or infrequently. 772 F.2d at 96 (citing Senate Report at 14, *reprinted in* 1977 U.S.C.C.A.N. at 3414, and S. Rep. No. 95-461, 95th Cong., 1st Sess. 37, *reprinted in* 1977 U.S.C.C.A.N. 3485, 3485). Under *Old Dominion*, Joy asserts that it was neither sufficiently engaged in the extraction process nor continuously present at the mine, and thus does not meet the requirements for operator status. Alternatively, Joy asserts that under FMHSRC's two-part nexus test, which is a diluted version of the *Old Dominion* test, it is not an operator because it did not provide a service sufficiently related to the extraction process or maintain a presence in a mine that is not rare, infrequent, and attenuated. *Otis II*, 11 F.M.S.H.R.C. at 1922-23.

The Secretary, on the other hand, urges us to adopt the approach taken in *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990), in which the Court of Appeals for the D.C. Circuit adopted a broad reading of section 3(d) based on the plain meaning of the statute. In construing the term ''operator,'' the D.C. Circuit concluded that ''the phrase 'any independent contractor performing services . . . at [a] mine' means just that—any independent contractor performing services at a mine.'' *Id.* at 1290. The court refused to look beyond the plain meaning of section 3(d) and rejected the approach taken in *Old Dominion* in which the Fourth Circuit derived its two limiting criteria based on the statute's legislative history. Even looking to the legislative history, the court concluded that Congress's only express intent was to ''include'' those contractors meeting the *Old Dominion* criteria and found ''nothing (that) expressly states an intent to cover only these independent contractors.'' 921 F.2d at 1290 (citing Senate Report at 14, *reprinted in* 1977 U.S.C.C.A.N. at 3414 (''[T]he definition of mine 'operator' is expanded to include 'any independent contractor performing services or construction at such mine.' '')).

Like the D.C. Circuit in *Otis Elevator,* we decline to adopt either the *Old Dominion* approach or the Commission's diluted version of that approach. Rather, we think the definition of "operator" in section 3(d) of the Mine Act is clear and means just what it says—an operator includes "any independent contractor performing services . . . at [a] mine." *See Otis Elevator,* 921 F.2d at 1290. Although Congress may have been specially concerned with contractors who are engaged in the extraction process and who have a continuing presence at a mine, *see id.,* section 3(d) by its terms is not limited to these contractors. Nothing in the legislative history shows a " 'clearly expressed legislative intention' " to the contrary that would allow us to "question the strong presumption that Congress expresse[d] its intent through the language it cho[se]." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 n.12 (1987) (citation omitted).

Joy, nonetheless, argues that Congress could not have intended a definition of "operator" that is so broad as to include mere vendors, such as the Xerox service representative who comes onto mine property to repair a copy machine. In this regard, Joy argues that the legislative history is important for what it does not contain, asserting that there is no evidence in the legislative history that Congress intended to include equipment vendors like Joy, whose only contact with the mine is in providing services pursuant to a contract of sale. For present purposes, it is enough to conclude that we are constrained by the plain meaning of the words Congress chose. The phrase "any independent contractor performing services . . . at [a] mine" may be broad, but its meaning is clear. In this case, Joy sent a service representative onto mine property, who, in carrying out his job, performed services at the mine. Accordingly, Joy is subject to regulation as an "operator" under the Mine Act. For the foregoing reasons, we AFFIRM.

APPENDIX B

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 14, 1995

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

JOY TECHNOLOGIES INC.—
COAL FIELD OPERATIONS

Docket No.
WEST 93-129

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY: Jordan, Chairman; Doyle and Holen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). It presents the issues of whether Joy Technologies Inc.—Coal Field Operations ("Joy") is an independent contractor-operator within the meaning of section 3(d) of the Mine Act, 30 U.S.C. § 802(d),[1] and, if so, whether it was

[1]Section 3(d) of the Mine Act provides:

> "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine[.]

30 U.S.C. 802(d).

liable for a violation of 30 C.F.R. § 48.28.[2] Commission Administrative Law Judge Gary Melick concluded that Joy was an operator under the Mine Act and that it was liable for the violation. 15 FMSHRC 2147 (October 1993) (ALJ). The Commission granted Joy's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Joy manufactures, sells and services mining equipment, and has provided equipment to Somerset Mining Company for use at its Sanborn Creek Mine, an underground coal mine. 15 FMSHRC at 2147. Joy employs service representatives who, after an equipment sale, provide follow-up services to customers. *Id.* at 2147-48; Tr. 13.

Dixson McElhannon is the Joy service representative for the Sanborn Creek Mine. 15 FMSHRC at 2148. His responsibilities include assuring that equipment is delivered in proper condition, advising and assisting in assembly and repairs, and procuring necessary parts. *Id.* at 2147-48; Tr. 13-14, 34-35, 43-44. He "troubleshoots" when problems arise with Joy equipment. 15 FMSHRC at 2148; Tr. 13. McElhannon performs services both on the surface and underground. Tr. 36; Stip. 10; Ex. M-2. Consistent with Joy's policy, McElhannon's service calls at Sanborn Creek Mine continued after the warranties on Joy equipment expired. 15 FMSHRC at 2148; Tr. 46.

---

[2]Section 48.28(a), which implements the refresher training requirement of section 115(a) of the Mine Act, 30 U.S.C. § 825(a), provides: "Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section." Section 115(a) of the Mine Act provides in part: "all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months . . ." 30 U.S.C. § 825(a).

Service reports filed by McElhannon show that, during the 2½ month period from January 24 through April 7, 1992, he visited the mine on at least four occasions, twice for two-day periods, for a total of six days. 15 FMSHRC at 2148-50. McElhannon also visited the mine on other occasions but did not prepare a report. *Id.* at 2148.

During his visit on March 2 and 3, McElhannon assisted in the unloading of two new shuttle cars. *Id.* at 2149. He checked the cars to ensure that they were in working condition, provided technical assistance in identifying a problem with one of the cars, and obtained a replacement part. *Id.*

On April 6, 1992, he visited the mine to oversee the unloading and assembly of a new Joy continuous miner and to ensure that it worked properly when assembled. *Id.* at 2149-50; Tr. 31-32. After unloading, the miner was taken in sections to the maintenance shop; assembly of the miner began on April 7. 15 FMSHRC at 2150. While assisting in the assembly, McElhannon operated the remote control to move the mining machine so that the maintenance workers could insert pins. *Id.*

That same day, Inspector Larry Ramey from the Department of Labor's Mine Safety and Health Administration ("MSHA") arrived in the shop to continue his inspection of the mine. Tr. 62-63; 15 FMSHRC at 2150. At that time, the maintenance workers were having some difficulty with the equipment's hydraulic system. Tr. 64-65, 106-07. Ramey observed McElhannon at the remote controls, raising and lowering the cutter head. Tr. 64-65. A coal miner was standing in front of the head while it was being raised and lowered. 15 FMSHRC at 2150; Tr. 63-65. Ramey believed that the equipment operator was endangering the safety of that miner; the inspector was primarily concerned that the head could become energized and strike the employee, causing his death. Tr. 63-64. Ramey determined that McElhannon had not received refresher training within the preceding year

and issued Order No. 3581501, which required the withdrawal of McElhannon from the mine pursuant to section 104(g)(1) of the Mine Act,[3] 30 U.S.C. § 814(g)(1). 15 FMSHRC at 2148; Tr. 66, 71; Ex. M-3.

Following an evidentiary hearing, the judge concluded that Joy was an independent contractor-operator subject to liability under the Mine Act. 15 FMSHRC at 2150-52. He based his determination on Joy's performance of "continuing services in connection with . . . contracts of sale." *Id.* at 2151. The judge also found that "Joy's representative was . . . performing limited but necessary services at the Sanborn Creek Mine . . . ." *Id.* Relying on section 3(d) of the Act, on *Otis Elevator Co. v. Secretary of Labor,* 921 F.2d 1285 (D.C. Cir. 1990), and on the Commission's decisions in *Bulk Transportation Services, Inc.,* 13 FMSHRC 1354 (September 1991), and *Lang Brothers, Inc.,* 14 FMSHRC 413 (September 1991), the judge concluded that, because Joy was providing essential services closely related to the extraction process, Joy's presence at Sanborn Creek Mine was sufficient to make Joy an operator within the meaning of Section 3(d) of the Act. 15 FMSHRC at 2151-52.

The judge also found that, because McElhannon had not received annual refresher training, Joy had violated section 48.28(a). *Id.* at 2152. He concluded that the violation was not significant and substantial and assessed a civil penalty of $100. *Id.*

---

[3]Section 104(g)(1) of the Mine Act provides in part:

> If . . . the Secretary . . . shall find employed at a . . . mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary . . . shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the . . . mine, and be prohibited from entering such mine until . . . the Secretary determines that such miner has received the training required by section 115 of this Act.

II.

Disposition

A. Whether Joy is an Independent Contractor

Joy asserts that it is not an independent contractor within the meaning of section 3(d) of the Mine Act. It relies on the definition of independent contractor set forth in 30 C.F.R. § 45.2 [4] and argues that it has not contracted to perform services at Sanborn Creek Mine. J. Br. at 9-11. The Secretary responds that section 3(d) of the Mine Act does not require the existence of a contract to establish independent contractor-operator status. S. Br. at 22 n.8.

We reject Joy's argument that the absence of a service contract precludes a finding that Joy is an independent contractor. In *Bulk* the Commission stated:

> Our focus is on the actual relationships between the parties, and is not confined to the terms of their contracts. . . . [T]he determination of whether a party is properly designated to be within the scope of section 3(d) of the Act is not based upon the existence of a contract, nor the terms of such a contract.

13 FMSHRC at 1358 n.2. Moreover, it is settled law that an entity may be held to be an independent contractor based on its performance of work "in connection with, or for the purpose of

---

[4]Section 45.2 states:

As used in this part:

. . .

(c) *Independent contractor* means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine . . .

carrying out, the contract of sale. . . ." 41 Am.Jur.2d, Independent Contractors § 18. We conclude that the regulation's reference to "contracts to perform services" is not restricted to written contracts and encompasses services performed incident to a contract of sale. Accordingly, we affirm the judge's conclusion that Joy is an independent contractor.

B. **Whether Joy is an Operator**

The parties also disagree on the appropriate standard for determining operator status under section 3(d) of the Mine Act. Asserting that it provided only limited services at Sanborn Creek Mine and, therefore, was not an operator, Joy argues that the Commission cases cited by the judge were wrongly decided. J. Br. at 11-20. Relying on the decision of the United States Court of Appeals for the Fourth Circuit in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (1985), in which the court held that a power company that installed, maintained and read an electric meter monthly at a substation separated by a chain link fence from the rest of the mine property was not an operator within the meaning of section 3(d), Joy urges the Commission to adopt a narrow definition of operator. J. Br. at 15-22.

The Secretary responds that the Commission should adopt the broad definition of operator set forth by the United States Court of Appeals for the D.C. Circuit in *Otis Elevator Co. v. Secretary of Labor*, i.e., that section 3(d)'s reference to "any" independent contractor performing services at a mine "means just that—any independent contractor . . . . " S. Br. at 8-9, *quoting* 921 F.2d at 1290 (footnote omitted) (emphasis in original). In the alternative, the Secretary contends that, in light of the frequency of McElhannon's visits to the mine, his travels underground, and the importance of his work to the mining and transporting of coal at Sanborn Creek Mine, Joy is an independent contractor-operator either under the Commission's line of cases interpreting the term "operator" or under *Old Dominion*. S. Br. at 13-20.

As the Commission has noted, section 3(d) of the Mine Act expanded the definition of "operator" contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977), to include "any independent contractor performing services or construction at such mine." *E.g., Bulk Transportation,* 13 FMSHRC at 1357. In the *Otis Elevator Co.* cases, 11 FMSHRC 1896 (October 1989) *("Otis I")* and 11 FMSHRC 1918 (October 1989) *("Otis II"), aff'd on other grounds,* 921 F.2d 1285, the Commission set forth a two-pronged test for determining whether an independent contractor may be considered an operator under section 3(d). First, "the independent contractor's proximity to the extraction process" and whether its work is "sufficiently related" to that process are examined. *Otis I* at 1902. The Commission has found a contractor's activity to be sufficiently related to the extraction process where its employees are exposed to mining hazards and have "a direct effect on the safety of others . . . . " *Id.* Second, the Commission examines "the extent of [the contractor's] presence at the mine." *Otis I,* 11 FMSHRC at 1902. The Commission has formulated this test as whether the contractor's "contacts with the . . . mine were not so rare, infrequent, and attenuated as to bring this case within the holding of *Old Dominion* . . . ." *Otis II,* 11 FMSHRC at 1922-23. As the Commission noted in *Otis I,* "there may be a point . . . at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed." 11 FMSHRC at 1900-01, *quoting National Indus. Sand Ass'n v. Marshall,* 601 F.2d 689, 701 (3d Cir. 1979).

We conclude that Joy's presence at Sanborn Creek Mine was sufficient to satisfy the test set forth in the Commission's *Otis* cases and their progeny. As to the first prong of the analysis, the parties stipulated that the continuous miner is an "essential

piece of mining equipment." Tr. 34; Stip. 5. McElhannon testified that the Joy shuttle cars used at the mine are essential to the mining process. Tr. 41. We agree with the judge that, in troubleshooting problems with the Joy continuous miner and shuttle cars, providing technical assistance related to the unloading, assembly and operation of Joy equipment, and securing needed parts, Joy's representative engaged in activities essential to the extraction process. Coal could not be mined without the continuous miner and shuttle cars. The first prong is also satisfied because, in performing his service work in the maintenance shop and underground, McElhannon was exposed to the hazards of the Sanborn Creek Mine and his work directly affected the safety of miners. The withdrawal order was issued because Inspector Ramey believed that McElhannon's operation of the continuous miner was endangering the safety of an employee working nearby. We conclude that substantial evidence supports the judge's determination that Joy's work is sufficiently related to the extraction process to satisfy the first prong of the Commission's operator test.

As to the second prong of the test, Joy's contacts with the mine were more than *de minimis*. McElhannon visited Sanborn Creek Mine regularly. He spent at least six days at the mine during a 2½ month period, and his contacts could be expected to continue. Joy was present at the mine at least as frequently as the contractors in *Otis I* (six hours per month) and *Lang Bros.* (seven to ten days on a non-continuing basis). As the judge concluded, Joy's contacts were sufficient to establish that services were being performed. 15 FMSHRC at 2151. Moreover, in *Lang Bros.*, the Commission explained that "[a]n independent contractor's presence at a mine may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence." 14 FMSHRC at 420. We conclude that substantial evidence supports the judge's determination that

Joy's presence at Sanborn Creek Mine also satisfies the second prong of the Commission's operator test.

We are not persuaded by Joy's argument that, based on *Old Dominion,* we should narrowly construe the term "operator." In *Old Dominion,* the court set forth a two-part test for determining whether a contractor is an operator under the Mine Act: whether the contractor is "engaged in the extraction process" and whether it has a "continuing presence at [a] mine." 772 F.2d at 96-97.

In *Otis I,* the Commission declined to construe *Old Dominion* narrowly, stating:

> To adopt . . . [a] restrictive interpretation of *Old Dominion* . . . would . . . frustrate Congress' clear intent, when it expanded the definition of "operator" in the Mine Act, to broaden and facilitate direct regulation of independent contractors on mine property.

11 FMSHRC at 1901-02. The Commission's interpretation of *Old Dominion* is consistent with recent case law in the Fourth Circuit. In *United Energy Services, Inc. v. MSHA,* 35 F.3d 971 (4th Cir. 1994), decided after the filing of the briefs in this case, the court did not narrowly construe the term "operator." The contractor in *United Energy* maintained a conveyor belt, a small portion of which was located on mine property, that was used to transport coal waste to an adjacent power plant. *Id.* at 973. The court stated:

> [T]he activities of United Energy's employees are part of the coal preparation process and thus are sufficiently a part of the mining process to qualify United Energy as an independent contractor covered by the Act. We therefore conclude that United Energy had contacts with the mine site of sufficient frequency and of such a nature as to meet those requirements for being an "independent contractor" performing services at a coal mine. *Cf Otis Elevator Co. v.*

Secretary of Labor, 921 F.2d 1285, 1290-91 (D.C. Cir. 1990) (interpreting statutory language to include *any* independent contractor performing services at a mine).

Id. at 976 (emphasis in original).

In light of our disposition, we do not reach the Secretary's argument that the Commission should adopt the operator test set forth by the D.C. Circuit in its decision affirming *Otis I* and *II*. Clearly Joy would be a statutory operator under that test.

C. *Joy's Other Contentions*

We reject Joy's contention that it should not be held to have violated § 48.28(a) because it could not have provided the necessary training. As the Secretary points out, Joy may arrange with Sanborn Creek Mine to provide the training, as was done to abate the cited violation. S. Br. at 22-23. Nor does Joy's liability for the violation in this case automatically subject it to liability for all health and safety violations at the mine, as Joy argues. J. Br. at 21-22. The Secretary notes that, "[i]f a regulation pertains to a matter over which Joy and its employees truly have no control, there is no reason to expect that Joy would be held responsible for a violation of that regulation." S. Br. at n. 10. *See also* III *MSHA Program Policy Manual* 6 ("some provisions of the Act, standards or regulations may not be directly applicable to independent contractors or their work"). In any event, Joy may challenge future citations if it believes the owner-operator should have been the object of the Secretary's enforcement action. "[T]he Commission has recognized that its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion." *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994) (citations omitted).[5]

[5]In its Petition, Joy also assigned as error the judge's failure to address its contention that McElhannon was not a "miner." Pet. at 9. We do not address this issue because Joy did not argue it in its brief. *See Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993).

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Commissioner Marc Lincoln Marks, concurring:

I concur in the result reached by my colleagues in this case; however, I reach that common result by means of a different analytical path.

Specifically, in my view, the D.C. Circuit's opinion in *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990) (''*Otis Elevator*'') represents the most reasoned approach to interpreting the term ''operator'' under section 3(d) of the Mine Act, 30 U.S.C. § 802(d). The D.C. Circuit in *Otis Elevator* strictly construed section 3(d) of the Mine Act, which provides that the term ''operator'' includes ''*any* independent contractor performing services . . . at [a] mine.'' Section 3(d) of the Mine Act (emphasis added). The court stated that ''any'' meant ''*any* independent contractor performing services at a mine.'' 921 F.2d at 1290, quoting Section 3(d) of the Mine Act (emphasis in original). The D.C. Circuit found no warrant in the plain language of the Act, or in the legislative history, for diluting the term ''any.'' *Id.; c.f. Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985), *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354 (September 1991); *Lang Brothers, Inc.*, 14 FMSHRC 413 (September 1991); *Otis Elevator Co.*, 11 FMSHRC 1896 (October 1989); and *Otis Elevator Co.*, 11 FMSHRC 1918 (October 1989). Neither do I. Along with the D.C. Circuit, I leave open the question of whether there is any point at which an independent contractor's ''contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed.'' 921 F.2d at 1290, n.3.

In my view, this case presents the Commission with an opportunity to align its interpretation of this section of the Mine Act with that set forth in *Otis Elevator*. In contrast to my colleagues, I take this opportunity and adopt *Otis Elevator*. Applying *Otis Elevator*, I conclude that the record amply supports the

judge's determination that Joy, an independent contractor,[1] was performing services at a mine. Specifically, the record reveals that Joy's representative: (1) was troubleshooting problems with the Joy shuttle car and continuous miner; (2) provided technical assistance related to the unloading, assembly, and operation of Joy equipment; (3) secured needed parts; and (4) operated a continuous miner in a way that resulted in the instant citation. Such activities clearly constitute the performance of services at a mine by an independent contractor.

Finally, I agree completely with the analysis employed by my colleagues in rejecting Joy's impossibility defense. See slip op. at 7.

Marc Lincoln Marks

[1]For the reasons set forth by my colleagues, I agree that Joy is an independent contractor. *See* slip op. at 4.

APPENDIX C

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

October 14, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), *Petitioner,* v. JOY TECHNOLOGIES, INC.,- COAL FIELD OPERATIONS, *Respondent*	CIVIL PENALTY PROCEEDING Docket No. WEST 93-129 A.C. No. 05-04452-03501 BBO Sanborn Creek Mine

DECISION

Appearances: Margaret Miller, Esquire, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; W. Scott Railton, Esquire, Reed, Smith, Shaw and McClay, McLean, Virginia, for Respondent

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," charging Joy Technologies, Inc. (Joy) with one violation of the standard at 30 C.F.R. § 48.28(a). A preliminary

issue is whether Joy is subject to jurisdiction under the Act as a mine "operator." If Joy is found to be within such jurisdiction, then the general issue is whether Joy violated the cited standard and, if so, what is the appropriate penalty to be assessed.

The subject Sanborn Creek Mine is an underground coal mine operated by the Somerset Mining Company (Somerset). Joy is the manufacturer of mining equipment and parts. Joy sells its equipment and provides followup services to its customers, such as expert advice on repairs and assistance in obtaining parts. Joy maintains that while it sold equipment to and provided such followup services for the Sanborn Creek Mine it was neither an "operator" nor an "independent contractor" as defined in the Act and that therefore the Secretary had no jurisdiction under the Act to issue the order at bar.

The Order, No. 3581501, was issued April 7, 1992, pursuant to Section 104(g)(1) of the Act,[1] by Coal Mine Safety and Health Inspector Larry Ramey for the alleged failure of Joy Service Representative Dixson McElhannon to have received eight hour annual refresher training required by the cited standard. There is no dispute that McElhannon had not received the training.

McElhannon had been employed by Joy as a service representative since August 1990. He is experienced as a miner, is a certified mechanic and is considered to be an expert in the

---

[1]Section 104(g)(1) of the Act provides an follows:

If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

mechanics of Joy mining equipment. McElhannon's job as a service representative for Joy includes acting as a "troubleshooter" for Joy equipment at mines where such equipment is used. In that capacity he often determines what parts are necessary, orders the parts and ascertains that the parts are delivered. McElhannon maintains that he does everything but the installation of the parts. In addition, when new equipment is shipped, he determines that the equipment in properly unloaded, that it is not damaged, and that it performs as it should. McElhannon testified that he continues to visit his customers regularly even after the manufacturer warranties have expired and that Joy provides such services for as long as its equipment is being used.

The evidence shows that the Sanborn Creek Mine had been reopened and coal production resumed in August, 1991 by Somerset. The documentary evidence shows that between January 24, 1992 and the date the instant order was issued on April 7, 1992, McElhannon had performed services on a number of occasions at the Sanborn Creek Mine in his capacity as a Joy service representative (Exhibit M-2). McElhannon acknowledged at hearing that he was also present in this capacity at this mine at other times not documented.

On the Joy sales/service report dated January 24, 1992, McElhannon noted as follows:

> Went under ground to trouble shoot cutter gear box problems. Discovered right hand high speed gear on cutting motor was bad. Also cutter head hinge pin was missing (found in magnet). They decided to run machine on afternoon shift anyway and do repairs on weekend.

On the February 19, 1992 report, McElhannon noted as follows:

> Assisted mine mechanic in a complete remove rebuild and replacement of complete cutter head on the machine.

> Replaced all bearings and seal throughout cutter case and both pinion bevel gears.

On the March 2, 1992 report, McElhannon noted as follows:

> Assisted mine mechanics unloading new shuttle car installed electrical nip checked out everything on car. Found atmospheric relief valve on boom. Lift leaking through. Talked to Kim Ball to have valve replaced on warranty. Valve Part Number 571668. They cut side boards off of car and took it underground 3-4-92.

On the March 3, 1992 report, McElhannon noted as follows:

> Assisted mine mechanics unloading new shuttle car. Hooked up power and checked car operation. No problems were found.
>
> They will cut sideboards off and the car will go underground 3-5-92.

Finally, on the April 6, 1992 report, McElhannon noted as follows:

> Assisted mine mechanics unloading machine as it arrived on mine property. On 4-7-92 we started reassembling new miner and on 4-11-92 we took miner underground and on 4-13-92 miner went into production.
>
> The machine is currently in a seven foot coal seam on 20 foot cut as is not cutting to full potential. They are developing a lower seam with more height and have asked for a variance for 40 ft cuts which will increase production dramatically.

On April 6, 1992, Joy delivered a new continuous miner to the Sanborn Creek Mine. It was delivered in sections on three trucks and was unloaded and placed in the maintenance shop. On

April 7, 1992, MSHA Inspector Larry Ramey entered the maintenance shop while Somerset Maintenance Supervisor Bill Pecharich and his crew were assembling the new miner. Joy Service Representative McElhannon was also present at this time and was using a remote control device to move the main frame of the continuous miner to help a mechanic pin it together. Ramey observed another person standing at this time in front of the cutter heads on the continuous miner.

Section 3(d) of the Act defines the term "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine . . ." In *Otis Elevator Company* v. *Secretary of Labor and FMSHRC*, 921 F.2d 1285 (D.C. Cir. 1990), the court held that in Section 3(d) the "phrase 'any independent contractor performing services . . . at [a] mine' means just that" and that the court "did not confront . . . whether there is any point at which an independent contractor's contact with a mine is so infrequent, or *de minimis*, that it would be difficult to conclude that services were being performed since [Otis] conceded that it was performing limited but necessary services at the mine" (921 F.2d at 1290 n. 3). Otis had a contract to service the shaft elevators at a mine.

In *Lang Brothers, Inc.*, 14 FMSHRC 413 (1991), Lang Brothers had an annual contract to clean and plug gas well sites for Consolidation Coal Company "to ensure that natural gas does not seep through the well into a mining area and create a safety hazard." 14 FMSHRC 414. In holding that Lang Brothers was an "operator," the Commission stated:

> Lang's work at the well sites . . . was integrally related to Consol's extraction of coal. *Cf. Carolina Stalite*, 734 F.2d at 1551. The sole purpose of Lang's cleaning and plugging contract with Consol was to facilitate Consol's extraction of underground coal. 14 FMSHRC at 418.

The Commission did not adopt the restrictive interpretation of *Old Dominion Power Company* v. *Secretary of Labor and FMSHRC*, 772 F.2d 92 (4th Cir. 1985) (implying that an independent contractor must have a "continuing presence at the mine" to be held to be an "operator" under the Act). Rather, it held that the *de minimis* standard may be measured by the significance of the contractor's presence at the mine, as well as the duration or frequency of its presence. The Commission noted that even though Lang's actual presence at the mine to clean and plug wells was for a short period its activity was an integral part of Consol's extraction process.

In *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354 (1991), the contractor had a contract with a coal mine operator to transport coal from the mine to a generating station 40 miles away. The Commission noted that Bulk had a substantial presence at the mine — "[T]here is a constant flow of truck drivers in and out — four to five days a week" — 13 FMSHRC at 1359 — but it focused on the significance of Bulk's activities to the extraction process in determining that Bulk was an operator subject to the Mine Act. "Given the undisputed fact that Bulk was Beth Energy's exclusive coal hauler between Mine No. 33 and the generating station, and given the quantities of coal hauled by Bulk, we agree with the judge that Bulk's services in hauling coal were essential and closely related to the extraction process." 13 FMSHRC at 1359.

Within the above framework of law and evidence it is clear that Joy Service Representative McElhannon had been performing limited but necessary services at the Sanborn Creek Mine before and at the time of the issuance of the order at bar. It may reasonably be inferred that these services were essential to the extraction of coal in that McElhannon determined that the Joy mining equipment, including a continuous mining machine was property delivered, put together and in good working order.

McElhannon further performed followup services for Joy mining equipment at the Sanborn Creek Mine providing "troubleshooting" advice in the underground area of the mine, ordering parts, and assisting in specific repairs of mining equipment. The continued operation of mining equipment, including continuous miners and shuttle cars, is essential and closely related to the extraction of coal and its removal from the mine. Joy's representative was therefore clearly performing limited but necessary services at the Sanborn Creek Mine and Joy was therefore an "operator" within the meaning of the Act. *Otis Elevator Company, supra,* 921 F.2d at 1290 n. 3.

In reaching these conclusions I have not disregarded Joy's argument that it did not in fact have a contract to perform services at the Sanborn Creek Mine and that it was presumably therefore not an independent contractor. While there is insufficient evidence in the record to conclude whether or not such a specific service contract existed, it is undisputed that Joy, as a vendor, sold mining equipment (and parts) to be used at the Sanborn Creek Mine and that Joy, through its service representative, performed continuing services in connection with those contracts of sale. Under the circumstances Joy was an independent contractor. See, e.g., 41 Am Jur. 2d Independent Contractors, § 18.

Joy also argues that it is not responsible as a mine operator because it was not "continually present" at the Sanborn Creek Mine. However, the appropriate legal test to be applied includes consideration not merely of the duration and frequency of the contractor's presence at the mine, but also the significance of its presence usually expressed in terms of how essential and closely related such services are to the extraction process. See *Otis Elevator, supra; Lang Brothers, supra; Bulk Transportation, supra.*

Since there is no dispute that McElhannon had not received the safety training required by 30 C.F.R. § 48.28(a) as charged in

Order No. 3581501, the violation is proven as charged. However, in light of the inability of the Secretary to have shown that McElhannon did not have, through other experience, training and resources, the requisite knowledge that would be incorporated in the subject training I am unable to find that the violation was "significant and substantial" or of high gravity. In addition, in light of the good faith legal position taken by Joy in this case that it was not subject to the Act's jurisdiction, a finding of negligence is inappropriate. Under the circumstances and considering all of the criteria under Section 110(i) of the Act, I find that a civil penalty of $100 is appropriate.

ORDER

Joy Technologies, Inc. is hereby directed to pay a civil penalty of $100 within 30 days of the date this decision.

Gary Melick
Administrative Law Judge
703-756-6261